83-1483

NO. _____

Office - Supreme Court, U.S.
FILED
OCT 5 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

TERM, 1983

BUEL LEE SHEPHERD,
Petitioner

v.

United States of America,
Respondent

On Appeal from the United States Court
Of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari to the
Supreme Court of the United States of America

Franklin Smith, Esquire
656 N. Bridge St.
Post Office Box 307
Elkin, N. Carolina
28621

Solicitor General
United States Dept.
of Justice
Washington, D.C.
20530

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

IN THE SUPREME COURT OF THE
UNITED STATES

_____ TERM, 1983

NO._____

BUEL LEE SHEPHERD,
Petitioner

* *

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

* *

QUESTIONS PRESENTED

I. WHETHER OR NOT THE GOVERNMENT AGENTS HAD PROBABLE CAUSE TO ARREST THE DEFENDANT, BUEL LEE SHEPHERD, WITHOUT A WARRANT ON THE MORNING OF DECEMBER 3, 1980.

II. DID THE WARRANTLESS SEARCH OF THE DEFENDANT, BUEL LEE SHEPHERD'S AUTOMOBILE WITHIN THE CURTILAGE OF HIS HOME, VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

IN THE SUPREME COURT OF THE
UNITED STATES

_____ TERM, 1983

NO._____

BUEL LEE SHEPHERD,
Petitioner

* *

TABLE OF CONTENTS

	Page
Questions Presented - - - - - - - - -	2
Table of Authorities- - - - - - - - -	3
Opinions- - - - - - - - - - - - - - -	5
Jurisdiction- - - - - - - - - - - - -	5
Constitutional Provisions - - - - - -	6
Statement of the Case - - - - - - - -	7
Arguments - - - - - - - - - - - - - -	-12
Appendix - Copy of Opinion from United States Court of Appeals for the Fourth Circuit - - - -	-18
Certificate of Service- - - - - - - -	-52

TABLE OF AUTHORITIES

Citations

United States v. Branch, 565 F.2d 274 (4th Cir. 1977)

Katz v. United States, 389 U.S. 347, 357 (1967)

Carroll v. United States, 267 U.S. 132 (1925)

Chambers v. Maroney, 399 U.S. 42 (1980)

Texas v. White, 423 U.S. 67 (1975)

Coolidge v. New Hampshire, 403 U.S. 443 (1971)

United States v. Ventoe, 533 F.2d 838, 866-67 (3d Cir. 1976)

Cardwell v. Lewis, 417 U.S. 583, 590 (1974)

United States v. Bradshaw, 490 F.2d 1097, 1103 (4th Cir. 1974) cert. denied, 419 U.S. 895 (1974)

Arkansas v. Sanders, 442 U.S. 753 (1979)

Warden v. Hayden, 387 U.S. 294 (1967)

United States v. Santana, 427 U.S. 38 (1976)

Taylor v. United States, 286 U.S. 1,5 (1932)

Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950)

Cf. United States v. Hayden, 140 F. Supp. 429, 435 (D. Md. 1956)

Katz v. United States, 389 U.S. 347, 353 (1967)

United States v. Ramapuram, 632 F.2d 1149, 1153 (4th Cir. 1980) cert. denied, 450 U.S. 1030 (1981)

United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 946 (1977)

Brinegar v. United States, 338 U.S. 160, 175-76 (1948)

United States v. Chadwick, 433 U.S. 1 (1977)

United States v. Ross, ____ U.S. _____, 72 L.Ed.2d 572 (1982)

OPINIONS

The Opinion rendered by the United States Court of Appeals for the Fourth Circuit, filed August 4, 1983, is hereto attached and designated as the Appendix to this Petition for Writ of Certiorari.

JURISDICTION

The Petitioner, Buel Lee Shepherd, is charged pursuant to a Bill of Indictment filed December 29, 1980 for having violated Title 26 of the United States Code, Section 5601(a)(12) and Title 26 of the United States Code, Sections 5205 (a)(1) and 5604(a)(1). The Petitioner was tried in the United States District Court for the Middle District of North Carolina before the Honorable Hiram H. Ward, United States District Court Judge, on February 13, 1981, without a jury. The Petitioner was duly convicted by the Court and, by Judgment entered February

19, 198], was sentenced to fifteen (15) months on Count One of the Bill of Indictment, and, to five (5) years on Count Two of the Bill of Indictment, said sentence being suspended. The Petitioner was placed on probation for a five (5) year period after completion of the sentence imposed on Count One of the Bill of Indictment. The Petitioner gave notice of appeal to the United States Court of Appeals for the Fourth Circuit. His case was decided on August 4, 1983 by Judges Phillips, Murnaghan and Ervin, with Judge Murnaghan filing a dissenting opinion.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and par-

ticularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Government Agent Aubrey M. Huffman testified he was an employee of the Bureau of Alcohol, Tobacco and Firearms and was so employed on December 3, 1980 when he and ABC Officer Robert Cobb set up a surveillance of the residence of Buel Lee Shepherd, Route 3, North Wilkesboro, North Carolina. Agent Huffman testified that they situated themselves in a wooded area approximately one hundred years to the rear of the residence of Mr. Buel Lee Shepherd. At 8:15 a.m., he observed Buel Lee Shepherd leave his residence and walk to a 1971 Mercury Cougar that was located approximately seventy-five yeards to the rear of his residence. Mr. Shepherd opened the trunk compartment of the Mercury, went into a wooded area

and returned carrying one-gallon plastic jugs which he placed in the trunk of the Mercury automobile. Agent Huffman testified that Mr. Shepherd made three trips into the woods and back to the Mercury automobile, placing one-gallon plastic jugs in the trunk compartment each time, closed the trunk compartment, and then walked to the side of the Mercury automobile. At that time, Officer Lester Russell, whom Agent Huffman had notified by radio, drove into the driveway and pulled up behind the 1971 Mercury automobile. At that time Agent Huffman came out of the woods, asked Buel Lee Shepherd for the keys to the automobile, opened the trunk, and found thirty-eight gallons of illegal distilled spirits.

On voir dire, Agent Huffman testified he asked the Petitioner for the keys to the trunk of the automobile, did not

have a search warrant to search the automobile, nor, did he have the permission of the Petitioner, Buel Lee Shepherd, to search said Mercury automobile.

On Direct Examination, Agent Huffman testified the Mercury automobile was sitting dirrectly behind Buel Lee Shepherd's house, along with other vehicles - an orange Volkswagen and a pick-up, as well as one or two sheds and a house trailer; that the car was parked just beyond the house trailer and that just beyond the trailer there was an area that had been used for a garden and a wooded area.

Federal Agent, Lester G. Russell, testified that on December 3, 1980, he had been in radio contact with Agent Huffman; that at 8:15 a.m. he received a message from Agent Huffman that Buel Lee Shepherd was in the process of loading one-gallon jugs into the trunk of a

Mercury automobile and was advised to come to the residence of Buel Lee Shepherd in his vehicle. Agent Russell testified that when he arrived, Mr. Shepherd was standing on the driver's side of the vehicle; that he observed Agent Huffman asking Mr. Shepherd for the keys to the vehicle, which Mr. Shepherd took from his pocket and gave to Agent Huffman who then proceeded to use the keys and to open the trunk of the automobile.

On Cross-Examination, Agent Russell testified that, at no time, did Buel Lee Shepherd, the Petitioner, give permission to Agent Huffman to search the automobile and that they did not have a search warrant to search said vehicle.

At the close of the Government's evidence, Buel Lee Shepherd made a motion for directed verdict based upon the issue of search and seizure.

The Petitioner raised the issues of illegal search and seizure and, by and through proper objections made during the course of the trial, raised the fact that the vehicle was not on a public highway at the time the search was conducted, and presented these questions to be argued before the United States Court of Appeals for the Fourth Circuit. This case was first argued on July 17, 1981 in Wilmington, North Carolina before Judges Phillips, Murnaghan and Ervin. It was then re-argued on November 11, 1982 before the United States Court of Appeals in Richmond, Virginia. The decision of that Court was issued on August 4, 1983, bearing No. 81-5074.

ARGUMENTS

The United States District Court Judge for the Middle District of North Carolina, sitting as both Judge and as jury, failed to afford to the Petitioner the protection to which he was entitled pursuant to the Fourth Amendment of the United States Constitution. The United States Court of Appeals for the Fourth Circuit so departed from the accepted and usual course of judicial proceedings and recognized legal authorities and legal opinions of the United States Supreme Court so as to call for an exercise of the United States Supreme Court's supervision in this case. The exercise of supervision by the United States Supreme Court should be applied in this case due to the fact that some aspects of the case, relating to the protection guaranteed to the Defendant pursuant to

the Fourth Amendment of the United States Constitution, present questions of first impression to the United States Supreme Court. The United States Court of Appeals for the Fourth Circuit relied upon the cases of Katz v. United States, 389 U.S. 347, 357; Carroll v. United States, 267 U.S. 132; Chambers v. Maroney, 399 U.S. 42; Texas v. White, 423 U.S. 67; United States v. Ventoe, 533 F.2d 938, 866-67; United States v. Bradshaw, 490 F.2d 1097, 1103, cert. denied, 419 U.S. 895; United States v. Ross, 72 L.Ed.2d 572; as well as numerous Federal decisions.

Judge Murnaghan set forth in his dissenting opinion the following:

> "It is with no joy that I write to announce dissent. Nevertheless, the facts as to whether an emergency existed, justifying the jettisoning of the Fourth Amendment safeguard, are the facts. Buel Lee Shepherd was not free to drive his vehicle away. His car keys had

been impounded even before the trunk of the car had been opened.[1] The motorcar rested not on the public highway, where vehicles whizzing by emphasize the predominance of mobility, but on private property legitimately employed by Shepherd as a parking area. There were no less than two policement so that, even apart from the possible availability of a warrant through telephonic or wireless communication, one of them could have remained guarding the car and insuring its immobility while the other proceeded with the arrested Shepherd to a place where a warrant could be obtained.

Consequently, there simply was no exigency, and, absent it, no justification for disregard of the Fourth Amendment requirement that a warrant be obtained. Katz v. United States, 389 U.S. 347 (1967)

---

1 The insistence that Shepherd surrender his car keys, and the fact that the burden (which was never met) properly rested on the shoulders of the police who are trying to justify a warrantless search and seizure to prove whether or not Shepherd had been arrested made irrestible the conclusion that Shepherd was effectively immobilized before the

search of the trunk, and, a fortiori, of the opaque containers, took place."

Here, these learned Judges studied this case, asked for oral arguments on two occasions and pondered the legal questions from the time the case reached the Fourth Circuit after trial on February 13, 1981 until the time of their decision on August 4, 1983. It is believed by this Petitioner that the Court waited until the United States Supreme Court decided the case of United States v. Ross and other cases pending before the United States Supreme Court. Counsel for the Petitioner can not set forth better reasons, nor find better authorities, than those cited by Judge Murnaghan, Circuit Judge for the United States Court of Appeals for the Fourth Circuit. The case of Katz v. United States, 389 U.S. 347, 357 (1967), even though not

factually analogous to the facts of this case, is the only authority which tends to support and treat the questions presented in this Petition for A Writ of Certiorari. The United States Supreme Court should grant this Petition for A Writ of Certiorari, review the record, and write an opinion in this case.

WHEREFORE, the Petitioner, Buel Lee Shepherd, prays the Court that this Petition for A Writ of Certiorari be granted, that execution of judgment and the sentences imposed by the Trial Judge in the United States District Court for the Middle District of North Carolina be stayed pending a review by the United States Supreme Court, and for such other and further relief as the United States Supreme Court deems this Petitioner, Buel Lee Shepherd, justly entitled.

Respectfully submitted, this the

30th day of September, 1983.

FRANKLIN SMITH, Counsel for
Petitioner

656 North Bridge Street
Post Office Box 307
Elkin, North Carolina 28621
Telephone: (919)-835-1351

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5074

United States of America,

Appellee,

v.

Buel Lee Shepherd,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro. Hiram H. Ward, District Judge.

Reargued: November 11, 1982

Decided: August 4, 1983

Before PHILLIPS, MURNAGHAN and ERVIN, Circuit Judges

Franklin Smith for Appellant; David Smith, Assistant United States Attorney (H. M. Michaux, Jr., United States Attorney, John W. Stone, Jr., Assistant United States Attorney on brief) for Appellee.

ERVIN, Circuit Judge:

Buel Lee Shepherd was convicted of possessing thirty-eight gallons of moonshine whiskey on which the tax had not been paid, and of removing it from its place of manufacture and concealing it, in violation of 26 U.S.C. §§ 5205(a)(1), 5604(a)(1) and 5601(a)(12). On appeal, Shepherd contends that his arrest and the warrantless search of his automobile were unlawful, Therefore, he urges the fruits of the illegal arrest and search were improperly admitted at his trial. We hold that Shepherd's arrest was supported by probable cause, and that the warrantless search was justified under the automobile exception to the fourth

amendment.

I.

Late in the fall of 1980, Lester Russell, an investigator for the North Carolina liquor control board in Winston Salem, received information from a reliable confidential informant that the defendant was engaged in an illegal whiskey enterprise at his residence in North Wilkesboro, North Carolina, located fifty miles away. According to Agent Russell, on approximately thirty earlier occasions the informant had provided information that had led to over twenty-five convictions. After receiving the informant's report, Russell, together with North Carolina Alcohol and Beverage Control (ABC) Agent Robert Cobb and Agent Aubrey Huffman from the federal Bureau of Alcohol, Tobacco and Firearms, set up surveillance of the defendant's residence

on the morning of December 3, 1980. Russell remained in the police vehicle some distance away while Cobb and Huffman positioned themselves in woods approximately one hundred yards to the rear of Shepherd's residence.

At about 8:15 a.m., Huffman observed Shepherd leave his residence and walk to a 1971 Mercury Cougar parked approximately seventy-five yards to the rear of the house. After opening the trunk of the automobile, Shepherd made three trips into a wooded area near the vehicle and returned carrying translucent one gallon plastic jugs which he placed in the open trunk.[1] Shepherd then closed the trunk compartment and walked to the driver's side of the automobile. At this point Officer Russell drove up. Agent Huffman, leaving his observation point in the woods, walked up to Shepherd and asked

him for the key to the trunk. Shepherd took his car keys from his pocket and handed them to Huffman. Huffman then opened the trunk. The trunk of the car contained thirty-eight capped one gallon plastic jugs. The jugs were later opened without a warrant. Each jug contained moonshine. No tax had been paid and no tax stamps had been affixed to the jugs.

---

1 The record does not indicate how many jugs per trip Shepherd carried.

II.

We find no merit in Shepherd's contention that the agents lacked probable cause to arrest him. The agents had been supplied a tip from a highlt reliable informant whose aid in earlier cases netted over twenty-five convictions on approximately thirty tips. Upon taking up surveillance at the location

advised by the informant, the agents witnessed behavior consistent with the tip and with an illegal moonshine operation. The combination of a reliable tip and first-hand corroborative observation of suspicious activity provided ample cause to suspect Shepherd was engaged in criminal activity justifying arrest. See United States v. Branch, 565 F.2d 274 (4th Cir. 1977) (arrest supported by probable cause when police, acting on informant's tip that one Branch, carrying drugs, would alight from certain air flight, arrested man matching informant's description getting into car registered in Branch's name).

III.

We turn now to the most difficult issue of whether the warrantless search of Shepherd's automobile violated the fourth amendment to the United States

Constitution. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Although by its terms the amendment does not equate unreasonable searches with warrantless ones, the Supreme Court has long held this view. In Katz v. United States, 389 U.S. 347, 357 (1967), for example, the Court wrote that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the fourth amendment -- subject only to a few specifically established and well-delineated exceptions."

The search in this case was, of

course, carried out without a warrant. The specific exception to the warrant requirement which the government urges upon us is the so-called "automobile exception," first announced in Carroll v. United States, 267 U.S. 132 (1925).[2] In Carroll, federal prohibition agents and a state policeman observed a car

---

[2] The government also maintains that Shepherd consented to the search since he voluntarily relinquished the key at Agent Huffman's request. However, there is no evidence that Shepherd's consent was obtained. The officer asked for Shepherd's key, not for permission to search the trunk. Both Officer Huffman and Officer Russell agreed in their testimony that no consent had been obtained. Moreover, obeying a polite request issued by someone obviously in authority and capable of enforcing the request does not amount to "consent" to the request. Citizens may obey police commands, even those put in the form of polite requests (e.g., "please raise your hands above your hear"; "please give me your keys"), without any derivation from such non-vilitional acts of a conclusion that that have waived their constitutional rights.

traveling on the road between Detriot and Grand Rapids, Michigan. Several factors led the agents to believe the vehicle was involved in bootlegging; illicit liquor traffic was precalent in the area; the car's occupants had been observed before in the vicinity; and the agents recognized the occupants as persons having previously attempted an illegal liquor sale. The vehicle was stopped, and the agents proceeded to search the interior, uncovering a cache of illegal liquor hidden in the upholstery. The occupants were then placed under arrest. At their trial they maintained that the warrantless search of their car violated the fourth amendment. On appeal, the Supreme Court rejected this claim, reasoning that the suspects and evidence might have left the jurisdiction of the authorities by the time a warrant could have been ob-

tained. The Court made clear that it was the particular exigence of the situation that justified a warrantless search, adding that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used. . . ." Id. at 156.

The automobile exception took on new aspects in Chambers v. Maroney, 399 U.S. 42 (1970).[3] There, the suspects in an armed robbery were stopped on a public street in a station wagon one hour after the crime occurred. The occupants of the car were arrested, and the station wagon was driven to the police station where an immediate search uncovered two

---

[3] For developments in the area of automobile searches between 1925 and 1970, see generally 2 W. LaFave, Search and Seizure, § 7.2 (1978).

revolvers and other items which were admitted into evidence against one defendant in his trial for armed robbery. Despite the fact that, unlike the situation in Carroll, there was no danger that the suspect vehicle would leave the jurisdiction, since its owner was in jail, the Supreme Court validated the warrantless search:

> Neither Carroll . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is

> necessary to obtain a warrant for the search . . . .
>
> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes we see no difference between on one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. at 50-52 (footnote omitted) (emphasis supplied). See also Texas v. White 423 U.S. 67 (1975) (per curiam), discussed below.

While Shepherd acknowledges the relevance of these precedents, he argues

that two factors block the application of the automobile exception in his case: the car's location on private property, as opposed to the public highway,[4] and the absence of exigent circumstances once the agents gained control of the vehicle.

In response to these contentions we first point out that the Supreme Court has never held that a vehicle's location on private property forecloses application of the automobile exception under all circumstances. In Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion), the Court did note the enhanced privacy interest residing in a vehicle

---

[4] Evidently, the car was actually parked on property belonging to Shepherd's neighbor. For purposes of argument we assume no difference in the privacy interest residing in a car parked on one's own property and a car parked on the property of one's next door neighbor.

parked in a driveway. But in invalidating a warrantless vehicle search by police following a lengthy murder investigation, the Coolidge plurality chiefly relied on the authorities' failure to obtain a warrant despite ample advance opportunity to do so and despite knowledge that the car was not about to disappear. The vehicle, which authorities knew to contain incriminating evidence, had been under surveillance for days. At the time the car was seized in Coolidge's driveway, there was no indication that the vehicle was about to be driven away.

These circumstances contrast sharply with the facts before us. Prior to taking up surveillance on the morning of December 3, the agents had no knowledge that a specific vehicle was involved in Shepherd's moonshining operation. The informant had merely reported that Shepherd

was making illegal liquor. There was no advance opportunity to obtain a search warrant for Shepherd's car before observing the defendant loading jugs into the vehicle on his property. Indeed, even had the informant specifically related that Shepherd would be transporting whiskey on the morning of December 3, no warrants could have issued, absent information about the vehicle to be used, which would have met the specificity requirements prescribed under the law. See United States v. Vento, 533 F.2d 838, 866-67 (3d Cir. 1976). Furthermore, the agents moved in only when it became obvious that Shepherd had finished loading the vehicle and was about to drive off. At that moment, exigent circumstances compelled the agents to act or else risk losing both quarry and contraband. It makes no difference that the

car was seized on private property rather than stopped on the public highway. Cases such as Coolidge which draw this distinction involve stationary vehicles whose owners are absent from the scene. Here, the car was one brief moment away from being driven off by its owner. The courts have recognized that a car traveling on the public highway affords less privacy than the home, but that one's expectation of privacy in a vehicle is enhanced when the car is nestled in the driveway. See Cardwell v. Lewis, 417 U.S. 583, 590 (1974); United States v. Bradshaw, 490 F.2d 1097, 1103 (4th Cir. 1974), cert. denied, 419 U.S. 895 (1974). Still, the danger posed by the inherent mobility of an automobile must outweigh whatever enhanced privacy interest exists when the car is parked at home if it appears the car is about to take flight. Further-

more, we reject the notion that this was not a valid search and seizure but that it would have been converted into one had the officers waited until Shepherd drove his vehicle onto a public highway and then stopped him there. See Arkansas v. Sanders, 442 U.S. 753 (1979), discussed below.

We illustrate our position by postulating different facts.[5] Suppose Shepherd had been secretly observed carrying gallon jugs from the woods into his house. We have no trouble saying that a search warrant would have been essential before agents could enter the house and seize the containers. The law has long recognized the sanctity of the home may not be breached by government agents lacking warrants, except under the most extraordinary circumstances, as where life is endangered or where authorities are in

hot pursuit of a criminal suspect. See Warden v. Hayden, 387 U.S. 294 (1967); United States v. Santana, 427 U.S. 38 (1976).

As a second example, suppose Shepherd was seen storing jugs in a nearby wood shed and then padlocking the door. There too we would require a warrant, for a building within the curtilage of the home enjoys the same high expectation of privacy that the dwelling does. See Taylor v. United States, 286 U.S. 1, 5 (1932); Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950). Cf. United States v. Hayden, 140 F. Supp. 429, 435 (D. Md. 1956) ("shed . . . is protected against unreasonable searches without regard to whether or not it is within the curtilage

---

5 The following examples are intended for illustrative purposes only.

of a private dwelling"). See also Katz v. United States, 389 U.S. 347, 353 (1967) (any intrusion upon "the privacy upon which [one] justifiably relief" constitutes a search within the meaing of the fourth amendment).

What if Shepherd had carelessly stacked the jugs beside his house and then driven off on an errand? By leaving the jugs in the open Shepherd would have indicated no expectation of privacy that his liquor would not be spotted and authorities could act without a warrant. See Katz v. United States, 389 U.S. 347, 353 (1967); United States v. Ramapuram, 632 F.2d 1149, 1153 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981).

Finally, what if Shepherd had loaded the jugs into the trunk of his Mercury, but then gotten into his pickup truck and driven off? Here too we would ex-

pect the authorities to recognize the absence of exigent circumstances which would justify a warrantless seizure, and to dispatch one of their number to obtain a warrant. Of course, surveillance could continue, and if Shepherd's neighbor were to appear on the scene with a set of car keys and the obvious intention of leaving in the Mercury, the danger of losing the evidence would justify an immediate seizure of the car.

The reasonableness of the government's search in this case arose out of both the genuine exigency of the situation and the unreasonableness of alternatives. To have required the agents simply to confiscate the jugs and hold them and Shepherd on the scene while one of the agents drove fifty miles to Winston Salem in search of a federal magistrate to certify an inspection would

have been a pointless exercise in the presence of clear probable cause. Such a procedure would have been a far greater intrusion into Shepherd's privacy than the course of action actually taken. If the liquid inside the jugs had turned out to be spring water, Shepherd would have been on his way in a few minutes.

We are not moved by the argument that exigent circumstances fall away, and a warrant is therefore required, as soon as the driver of the suspect vehicle is arrested, as apparently was the case here.[6] Chambers v. Maroney, 399 U.S. 42 (1970), discussed above, clearly illustrates that the arrest of an auto's occupants does not preclude a warrantless search. The

---

[6] The facts are unclear as to whether Shepherd was arrested before or after the search of his car. Probable cause to arrest him existed at both points.

Chambers principle was affirmed in Texas v. White, 423 U.S. 67 (1975) (per curiam), in which police had seized the car of a suspect accused of attempting to pass bad checks. Just before the defendant was arrested in his car in a bank parking lot, officers saw him stuff papers between the seats. Back at the police station, the defendant refused to give consent to a search of his impounded vehicle. Without a warrant, the officers proceeded to search the vehicle anyway, uncovering four bad checks which the defendant had tried to pass at another bank. The Supreme Court, in a per curiam opinion (Brennan and Marshall, JJ., dissenting), upheld the admissibility of the four wrinkled checks, writing that, as in Chambers, "the probable cause factor that developed on the scene still obtained at the station house." Id. at 68

(citations omitted). The absence of exigent circumstances at the time the search was conducted evidently did not concern the Court.

The Fifth Circuit has interpreted Texas v. White, Chambers v. Maroney, and other Supreme Court authority as recognizing that "exigence is to be determined as of the time of seizure of an auto, not as of the time of its search." United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 945 (1977). This we perceive to be an accurate statement of the law and one which makes clear the constitutionality of the search in this case. The authorities had ample cause to believe Shepherd's Mercury was about to be used to transport contraband.[7] The agents'

7 No search, even one conducted under the most exigent of circumstances, is justified unless the government demonstrates that its officers had probable cause to believe evidence of criminality would be uncovered. Probable cause means less than evidence which would justify condenmation or conviction . . . . Probable cause exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed . . . .

Brinegar v. United States, 338 U.S. 160,]75-76 (1948) (citations omitted).

---

parked beside the defendant's house, a heightened expectation of privacy obtained which the agents invaded without a warrant. Second, we held that a more reasonable cause would have been for two of the agents to stand guard over the vehicle while the third sought a search warrant. Furthermore, since Bradshaw was absent from the scene, no individual

liberty interest would have been implicated merely by seizing and holding the car.

Absent from Bradshaw and present in this case is the compelling circumstance of imminent flight. The pick-up truck in Bradshaw was parked and unattended, but Buel Shepherd was at the point of climbing into his car and driving away. This is the circumstance that prompted the authorities to act. At the risk of belaboring the point, we stress that, assuming a heightened expectation of privacy in one's vehicle when the car is parked at home, this expectation must nevertheless yield in a situation where authorities have probable cause to believe that incriminating evidence is about to take wing. In such a case, the more reasonable course is to proceed with a warrantless search and, if nothing

is found, promptly to release the suspect and his or her vehicle.

We also think this case is distinguishable from United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979). In Chadwick federal officials suspicious of a footlocker leaking talcum powder watched as the defendant carried the trunk from a train station to his waiting automobile. After the defendant loaded the footlocker into the trunk of his car, agents moved in, arrested the suspect, and opened the footlocker without a search warrant, disclosing a large quantity of marijuana.

The Supreme Court invalidated the search, rejecting the argument that the warrant requirement of the fourth amendment protects only interests associated with the home. As a repository for the personal effects of an individual, a

footlocker holds a greater expectation of privacy than an automobile, the Court reasoned, and it makes no difference that, like the automobile, a footlocker is highly mobile. The government should not enter the zone of privacy associated with a footlocker without a search warrant.

Arkansas v. Sanders, 442 U.S. 753 (1979), involved very similar facts, except that the defendant had already departed the airport in a taxi along with his suspicious suitcase when police stopped the cab. The Court rejected the argument that the automobile exception applied. Writing in concurrence, Chief Justice Burger stated the essential position of the Court:

> The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's

> arrest does not turn this into an "automobile" exception case. The Court need say no more.

Id. at 767.

United States v. Chadwick and Arkansas v. Sanders were considered at length in United States v. Ross, _____ U.S. _____, 72 L.Ed.2d 572 (1982). In Ross, District of Columbia police officers acting on information that the defendant was peddling narcotics out of his car located the suspect vehicle traveling on the city streets. The car was pulled over, and Ross was ordered to get out. When a pistol was found in the glove compartment, Ross was arrested and handcuffed. One of the officers took Ross' keys and opened the trunk, where he discovered a closed brown paper bag. He opened the bag and found a number of glassine bags containing white

powder. The officer closed the paper bag and placed it back in the trunk. The car was driven to headquarters where a search, also warrantless, disclosed a zippered leather pouch. The pouch was opened and found to contain $3,200 in cash. A sample of the white powder in the paper bag was also taken and upon analysis determined to be heroin.

Prior to his trial for possession of heroin with intent to distribute, Ross moved to suppress the fruits of the warrantless searchs of the paper bag and leather pouch. The motion was denied and Ross was eventually convicted.

On appeal the Supreme Court upheld the search, holding that under the automobile exception, officers "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a search warrant 'particularly describing

the place to be searched.'" Ross, 72 L.Ed.2d at 578, quoting U. S. Const. amend. 4. The scope of such a search warrant could include the compartments and containers within the vehicle whose contents were not in plain view. The majority carefully distinguished Chadwick and Sanders on the grounds that in those cases the object of the government's searchwas confined the the interior of the footlocker and suitcase, whereas the officers in Ross had probable cause to search the entire vehicle.

We believe that the case before us is more akin to Ross than to Chadwick and Sanders.[8] Here the object of the

---

8 We admit considerable doubt that the plastic jugs here are deserving of the same privacy interest as the footlocker in Chadwick and the suitcase in Sanders. However, the Ross court held that all containers are to be accorded

agents' search was not directed solely to the interior of the few jugs which were seen loaded into the trunk of Shepherd's car. The agents had good reason to suspect, based on the information they had gathered as well as what they had seen with their own eyes, that the car was an instrumentality of Shepherd's illegal whiskey enterprise, and that a search of the vehicle would disclose additional evidence. As it turned out, this hypothesis proved correct; upon opening the trunk the agents found thirty-eight

---

equal dignity under the law. Ross, 72 L. Ed.2d at 592. We are tempted to say that plastic jugs, under the circumstances of this case, "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13 (1979). In the context of this case, a plastic jug partakes more the character of a gun case than a suit case.

gallons of illegal liquor, far more than they had observed from their hiding place. Under Ross, once the officers had probable cause to search the vehicle, they also acquired the authority to open any of the closed contained found therein.

IV.

We hold that the arrest of Buel Lee Shepherd was supported by probable cause and that the warrantless search of his vehicle was justified under the automobile exception.[9] His conviction is, therefore,

AFFIRMED.

---

[9] Because we find that the automobile exception governs this case, we need not consider whether the plain view doctrine is also applicable. See Texas v. Brown, ____ U.S. ____, 75 L.Ed.2d 502 (1983); United States v. Haynie, 637 F.2d 227 (4th Cir. 1980), cert. denied, 451 U.S. 972 (1981).

MURNAGHAN, Circuit Judge, dissenting:

It is with no joy that I write to announce dissent. Nevertheless, the facts as to whether an exigency existed justifying the jettisoning of the Fourth Amendment safeguards, are the facts. Buel Lee Shepherd was not free to drive his vehicle away. His car keys had been impounded even before the trunk of the car had been opened.[1] The motorcar rested not on the public highway, where vehicles whizzing by emphasize the predominance of mobility, but on private

---

[1] The insistence that Shepherd surrender his car keys, and the fact that the burden (which was never met) properly rested on the shoulders of the police who are trying to justify a warrantless search and seizure to prove whether or not Shepherd had been arrested made irrestible the conclusion that Shepherd was effectively immobilized before the search of the truck, and a fortiori, of the opaque containers, took place.

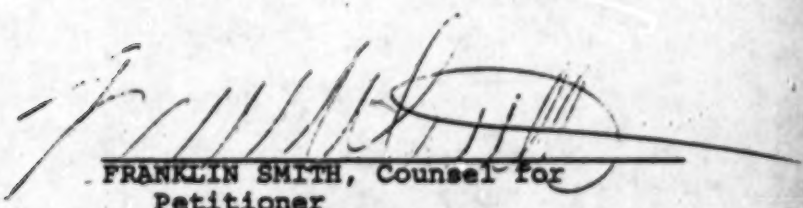
property legitimately employed by Shepherd as a parking area. There were no less than two policemen so that, even apart from the possible availability of a warrant through telephonic or wireless communication, one of them could have remained guarding the car and insuring its immobility while the other proceeded with the arrested Shepherd to a place where a warrant could be obtained.

Consequently, there simply was no exigency, and, absent it, no justification for disregard of the Fourth Amendment requirement that a warrant be obtained. Katz v. United States, 389 U.S. 347 (1967).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States of America was duly served upon opposing counsel by depositing a copy of the same with the United States Mail at the Post Office in Elkin, North Carolina, in an envelope, with postage prepaid, addressed as follows:

Solicitor General
United States Department of Justice
Washington, D. C. 20530



FRANKLIN SMITH, Counsel for
Petitioner

656 North Bridge Street
Post Office Box 307
Elkin, North Carolina 28621
Telephone: (919)-835-1351

END OF DOCKET